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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-3191

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INC., an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, the CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago,

Defendants-Appellants.

Appeal From the United States District Court
For the Northern District of Illinois,
Eastern Division

No. 97 C 7619

The Honorable
MILTON I. SHADUR,
Judge Presiding

MOTION FOR REMAND TO DISTRICT COURT FOR A REARING ON VACATING INJUNCTION ON GROUNDS OF MOOTNESS AND TO HOLD BRIEFING IN ABEYANCE PENDING A DECISION ON THIS MOTION

The defendants-appellants, the CITY OF CHICAGO, the CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, and PAUL WOZNICKI, in his official capacity as Zoning Administrator of the City of Chicago, by their attorney, BRIAN L. CROWE, Corporation Counsel of the City of Chicago, hereby move this court to remand this case to the district court for a hearing on whether the injunction should be vacated as moot and to hold briefing in abeyance pending a decision on this motion, and in support of their motion, state as follows:

BACKGROUND

This is an appeal from the district court's order holding that a city ordinance limiting the locations of billboards advertising cigarettes and alcoholic beverages is preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-41 (1994). (A copy of the district court's memorandum opinion and order is attached to this motion at A-1.) As to tobacco products, the City's ordinance prohibits the placement of signs advertising cigarettes in publicly visible locations, but does not apply to signs inside the premises licensed to sell tobacco products, to signs on such premises containing the name or slogan of the premises, to signs containing a generic description of cigarettes, or to neon or electrical signs advertising cigarettes on premises licensed to sell tobacco. *See* Municipal Code of Chicago, Title 17, § 5.17. (A copy of the ordinance is attached at A-29). In addition, the ordinance does

not limit or prohibit the placement of signs advertising cigarettes at special events, on any CTA vehicle, on property owned, leased or operated by the Illinois Sports Facilities Authority, at Comiskey Park, Soldier Field, the United Center, or Wrigley Field, on any property adjacent to an interstate highway, or in any district designated as a commercial-manufacturing district, a motor freight terminal district or a manufacturing district. *Id.*

The plaintiffs, an organization of entities that own outdoor advertising sign structures in the City and lease space to cigarette and alcoholic beverage manufacturers, *see* R. 1-1, filed a complaint challenging the City's ordinance. The complaint alleged that the ordinance violated the First Amendment of the United States Constitution, that the limitation on cigarette advertising was preempted by federal law, and that the limitation on advertising of alcoholic beverages was preempted by state law. *Id.*

The district court held that the limitations the ordinance placed on cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act. *See* A-21. The district court then held that the provisions relating to the advertising of alcoholic beverages were not severable from the limitations on cigarette advertising, and that, therefore, the entire ordinance was invalid. *See* A-24-25. The district court declared the ordinance null, void and of no legal effect, and enjoined the City from enforcing it. *See* A-25. The City appealed from that order.

On November 23, 1998, the state of Illinois entered the master settlement agreement between participating states and tobacco manufacturers to settle the states' litigation against the tobacco industry. A copy of the settlement agreement is attached to this motion at A-32. As a part of this settlement agreement, tobacco manufacturers have agreed to eliminate outdoor advertisements of tobacco products. *See* A-41. The settlement agreement defines "outdoor advertising" as follows:

> (1) billboards, (2) signs and placards in arenas, stadiums, shopping malls and Video Game Arcades (whether any of the foregoing are open air or enclosed) (but not including any such sign or placard in an Adult-Only Facility), and (3) any other advertisements placed (A) outdoors, or (B) on the inside surface of a window facing outward.

See A-36. The settlement also provides that the following are not included within the definition of "outdoor advertising":

> (1) an advertisement on the outside of a Tobacco Product manufacturing facility; (2) an individual advertisement that does not occupy an area larger than 14 square feet (and that neither is placed in such proximity to any other advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet, nor functions solely as a segment of a larger advertising unit or series), and that is placed (A) on the outside of any retail establishment that sells Tobacco Products (other than solely through a vending machine), (B) outside (but on the property of) any such establishment, or (C) on the inside surface of a window facing outward in any such establishment; (3) an advertisement inside a retail establishment that sells Tobacco Products (other than solely through a vending machine) that is not placed on the inside surface of a window facing outward; or (4) an outdoor advertisement at the site of an event to be held at an Adult-Only Facility that is placed at such site during the period the facility or enclosed area constitutes an Adult-Only Facility, but in no event more than 14 days before the event, and that does not advertise any Tobacco Product (other than by using a Brand Name to identify the event).

Id. The tobacco manufacturers have agreed to remove all existing outdoor advertising and transit advertisements within 150 days after execution of the settlement agreement and have agreed that they will not place or cause to be placed any new outdoor advertisements or transit advertisements of tobacco products within any settling state. *See* A-41.

In addition, the tobacco manufacturers have agreed that they will not initiate or cause to be initiated any facial challenge to the enforceability or constitutionality of a statute, ordinance or administrative rule relating to tobacco control that was enacted prior to June 1, 1998 by any settling state or political subdivision of a settling state. *See* A-48.

ARGUMENT

Under Article III of the United States Constitution, a case or controversy must exist at all stages of appellate review. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). " '[F]ederal courts do not have jurisdiction to review moot cases.' " *Buckley v. Archer-Daniels-Midland Corp.*, 111 F.3d 524, 526 (7th Cir. 1997) (quoting *Commodity Futures Trading Commission v. Hunt*, 591 F.2d 1211, 1224 (7th Cir. 1979)). This court has noted that " '[i]n general, a case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.' " *Id.* (quoting *Stewart v. Taylor,* 104 F.3d 965, 969 (7th Cir. 1997)). The doctrine of mootness "is premised upon the belief that a court should not enjoy the power to decide an unnecessary question that cannot affect the rights of the litigants before it." *Rembert v. Sheahan*, 62 F.3d 937, 940 (7th Cir. 1995). A decision on an issue that has become moot should be vacated. *See Jordan v. Indiana High School Athletic Association,* 16 F.3d 785, 787 (7th Cir. 1994).

There is a serious question whether the issue decided by the district court in this case has been rendered moot by the tobacco settlement agreement. "A case is moot if there is no possible relief which the court could order that would benefit the party seeking it." *In re Envirodyne Industries, Inc.*, 29 F.3d 301, 303 (7th Cir. 1994). The district court held that the ordinance limiting tobacco advertisements is preempted by federal law. The plaintiff is an organization of entities that own outdoor advertising sign structures and lease them to, among others, tobacco manufacturers advertising their product. Now the tobacco manufacturers have agreed to remove all outdoor advertisements and to place no new advertisements outdoors.

In fact, the tobacco settlement agreement places far broader restrictions on outdoor advertisements than does the City's ordinance. While the City ordinance allowed cigarette advertisements along interstate highways, on CTA vehicles, at Wrigley Field, Comiskey Park, the United Center and Soldier Field, and in commercial and manufacturing districts, under the settlement agreement, the tobacco manufacturers have agreed not to advertise outdoors in these locations. Therefore, the plaintiff's member entities will not be able to lease advertising space to advertise cigarettes despite the injunction issued by the district court in this case.

There is a minor difference between the settlement agreement and the ordinance: the settlement agreement may allow some small signs—no more than 14 square feet in size—on premises selling tobacco products that are not allowed under the ordinance, while barring other signs that the ordinance does allow on such premises—electrical signs larger than 14 square feet which the ordinance allows on premises licensed to sell tobacco. This minor difference, however, does not affect the plaintiff's ability to lease advertising space to tobacco manufacturers. Under the settlement agreement, tobacco manufacturers have agreed that

they will not initiate any challenge to the enforceability of an ordinance concerning tobacco control, like the City's ordinance. Thus, pursuant to the settlement agreement, the City can enforce its ordinance against the tobacco manufacturers, who have agreed not to challenge it. The manufacturers, therefore, will not be leasing advertising space from the plaintiff's members. As a result of the tobacco settlement agreement, the relief ordered by the district court as to tobacco advertisements will no longer benefit the plaintiff.

Of course, the district court also declared the restrictions on the advertising of alcoholic beverages null and void, *see* A-25, but that was only because it concluded that the restrictions on alcohol advertisements were not severable from the restrictions on cigarette advertisements, *see* A-24. The district court did not reach the merits of plaintiff's claims that the restrictions on alcohol advertisements were preempted by state law or violated the First Amendment. Therefore, if the district court's decision on tobacco advertising is moot, its decision should be vacated, *see Jordan*, 16 F.3d at 787, and the plaintiff's claims concerning the limitations on advertisements of alcoholic beverages should be determined by the district court before this case proceeds on appeal.

For these reasons, this case should be remanded to the district court for a hearing on whether the injunction it issued should be vacated as moot, and if it is, for a decision on the plaintiff's claims on the limitation on advertisements for alcoholic beverages. A decision in the district court in the first instance would best serve the purpose of judicial economy. In the meantime, we request that briefing of this appeal be held in abeyance pending this court's decision on this motion.

CONCLUSION

For the above reasons, the City respectfully requests that this court remand this matter to the district court for a hearing on whether the injunction issued by the district court should be vacated as moot and that briefing of this appeal be held in abeyance pending a decision on this motion.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

December 21, 1998

No. 98-3191

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

FEDERATION OF ADVERTISING INDUSTRY REPRESENTATIVES, INCORPORATED, an Illinois not-for-profit Corporation,

Plaintiff-Appellee,

—v.—

CITY OF CHICAGO, CHICAGO CITY COUNCIL, RICHARD M. DALEY, in his official capacity as Mayor of the City of Chicago, et al.,

Defendants-Appellants.

Appeal From the United States District Court
For the Northern District of Illinois,
Eastern Division.

No. 97 C 7619

Milton I. Shadur,
Judge.

The following is before the court:

1. MOTION FOR REMAND TO DISTRICT COURT FOR A HEARING ON VACATING INJUNCTION ON GROUNDS OF MOOTNESS AND TO HOLD BRIEFING IN ABEYANCE PENDING A DECISION ON THIS MOTION, filed on December 3, 1998, by counsel for the appellants.

2. RESPONSE IN OPPOSITION TO MOTION FOR REMAND, filed on December 9, 1998, by counsel for the appellee.

3. SUPPLEMENTAL RESPONSE IN OPPOSITION TO MOTION FOR REMAND, filed on December 11, 1998, by counsel for the appellee.

IT IS ORDERED that #1 is DENIED. Briefing will proceed as follows:

1. The brief and required short appendix of the appellants are due by January 19, 1999.

2. The brief of the appellee is due February 19, 1999.

3. The reply brief of the appellants, if any, is due March 5, 1999.

Note: The parties are advised that Rule 26(c), Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set by order of this court. All briefs are due by the dates ordered.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-35416

D.C. No.
CV-97-05076-RJB

JAMES R. LINDSEY: SUN CHA LINDSEY, and their marital community,

Plaintiffs-Appellants,

MBA, INC., a Washington corporation; F I T S, LLC, a Washington limited liability corporation; SAN JUNG CORPORATION, a Washington corporation,

Plaintiffs,

—v.—

TACOMA-PIERCE COUNTY HEALTH DEPARTMENT, a combined City-County Health Department; its Board of Health; TACOMA-PIERCE COUNTY BOARD OF HEALTH; FEDERICO CRUZ-URIBE, Director of Health for the Tacoma-Pierce County Health Department in his official capacity; BRIAN EBERSOLE, in his official capacity; FRANCEA MCNAIR, in her official capacity; WENDELL BROWN, in his official capacity; KAREN BISKEY, in her official capacity; LEONARD E. SANDERSON, in his official capacity; DAVID SPARLING, in his official capacity; ROBERT W. EVANS, in his official capacity,

Defendants-Appellees,

—and—

COUNTY OF PIERCE; CITY OF TACOMA,
a municipal corporation,

Defendants.

Filed February 14, 2000

Before: William C. Canby, Jr., Melvin Brunetti, and Diarmuid F. O'Scannlain, *Circuit Judges.*

ORDER; Concurrence by Judge O'Scannlain

ORDER

The opinion filed on November 19, 1999 and published at 195 F.3d 1065 is amended to include Judge O'Scannlain's specially concurring opinion attached hereto.

O'SCANNLAIN, Circuit Judge, specially concurring:

I concur in the thorough and well-reasoned opinion of the court, which faithfully applies Supreme Court precedent governing FCLAA preemption, as set forth in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). I write separately

only to note that in recent decisions outside of the FCLAA context, the Court appears to be moving toward an approach to preemption issues that is more pragmatic (rather than strictly textual) and more deferential towards state law. *See, e.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) (analyzing ERISA preemption).

The Court has made clear, however, that "[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *see also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (rejecting the proposition "that other courts should ever conclude that [the Supreme Court's] recent cases have, by implication, overruled an earlier precedent"). Thus we must follow *Cipollone*, rather than collateral intervening cases addressing preemption in different areas of the law. With this observation, I join wholeheartedly in the opinion of the court.